

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

RICHARD VELA, SR. and
RICHARD VELA, JR,

Plaintiffs,

v.

Civ. No. 23-430 KWR/GJF

CARLSBAD MEDICAL CENTER, LLC,
PECOS VALLEY OF NEW MEXICO, LLC
d/b/a PECOS VALLEY PHYSICIAN GROUP,
and CHSPSC, LLC d/b/a COMMUNITY
HEALTH SYSTEMS,

Defendants.

ORDER GRANTING MOTION TO COMPEL

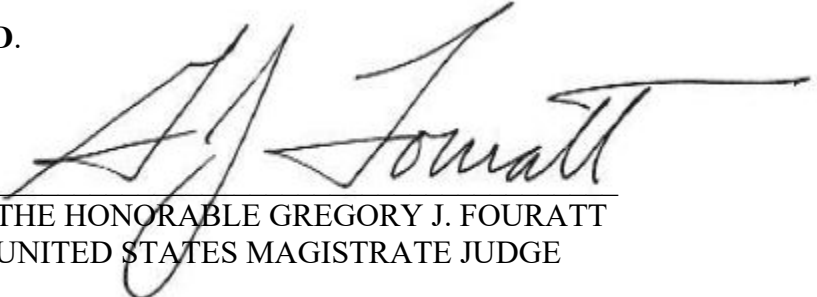
THIS MATTER is before the Court on Carlsbad Medical Center, LLC's Motion to Compel the Independent Medical Examination of Plaintiff Richard Vela, Sr., Without Counsel or a Third Party Present ("Motion to Compel"), filed April 16, 2024. ECF 55. Defendant Carlsbad Medical Center ("Defendant") explains that it sought an independent medical examination ("IME") of Plaintiff Richard Vela, Sr. by Defendant's expert physiatrist, Kara Flavin, M.D. *Id.* at 1. According to Defendant, Plaintiffs' counsel agreed to permit the proposed examination to take place on May 16, 2024, on the condition that "'someone'—purportedly one of the attorneys from their office—attend." *Id.* Pursuant to Federal Rule of Civil Procedure 35, which provides that the Court "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination," Defendant moved for an order compelling Plaintiff Richard Vela, Sr. to submit to the agreed-upon IME without the presence of counsel or any third party *other than* Plaintiff Richard Vela, Jr., on whose presence the parties agreed. *Id.* at 1–2.

The Court held a status conference on April 18, 2024, at which it inquired as to Plaintiffs' position on the Motion to Compel. ECF 58. Plaintiffs' counsel advised that he had the general

sense that it was appropriate for a plaintiff's attorney to attend a medical examination of their client when that examination was conducted by a defendant's expert witness. *Id.* at 3. Plaintiffs' counsel further indicated that he wished to file a response in opposition to the Motion to Compel. *Id.* at 4. In view of the IME scheduled for May 16, 2024, the Court expedited Plaintiffs' response deadline to April 26, 2024. *Id.*¹ The Court explained that it would consider the briefing closed and the motion ready for resolution upon the filing of Plaintiffs' response by April 26, 2024. *Id.*

Plaintiffs did not file any response to the Motion to Compel by the April 26, 2024 deadline imposed by the Court. Nor have they done so in the four days since. Accordingly, the Court considers their failure to do so as consent to grant the motion. *See* D.N.M.LR-Civ. 7.1(b) (“[t]he failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion.”). Moreover, the Court is satisfied that the weight of authority under federal law, including in this district, strongly favors excluding counsel from IMEs for the reasons articulated in the Motion to Compel. *See, e.g., Pepe v. Casa Blanca Inn & Suites, LLC*, No. 18-cv-476 JCH/JFR, 2019 WL 10960399, at *2 (D.N.M. July 11, 2019); *Hatchett v. United Parcel Serv., Inc.*, No. 13-cv-1183 MCA/SMV, 2014 WL 12792348, at *2 (D.N.M. June 12, 2014); *Romero v. Bradford*, No. 08-1055 MCA/LFG, 2009 WL 10708259, at *4 (D.N.M. Apr. 30, 2009).

IT IS THEREFORE ORDERED that Defendant Carlsbad Medical Center's Motion to Compel the Independent Medical Examination of Plaintiff Richard Vela, Sr. Without Counsel or a Third Party Present [ECF 55] is **GRANTED**.



THE HONORABLE GREGORY J. FOURATT
UNITED STATES MAGISTRATE JUDGE

¹ The Local Rules authorize the Court to expedite briefing schedules as necessary. *See* D.N.M.LR-Civ. 7.4(c).